



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/153583

PRELIMINARY RECITALS

Pursuant to a petition filed November 20, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Department of Health Services, Office of Inspector General, in regard to FoodShare benefits (FS), a hearing was held on January 14, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the Department of Health Service, Office of Inspector General (the agency) correctly determined that the Petitioner was over-issued FoodShare benefits from 5/30/2013 to September 30, 2013.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Judy Johnson, Interstate Agent
Office of Inspector General
200 N. Jefferson St., Suite 511
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. On October 9, 2013, the agency sent Petitioner a Notification of FoodShare Overissuance, Claim Number [REDACTED], indicating that Petitioner was over-issued FoodShare benefits in the amount of \$1325.00 for the period of May 30, 2013 through September 30, 2013. (Exhibit 9)
3. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on November 20, 2013. (Exhibit 1)
4. Petitioner is divorced and has placement of his two children during their summer vacation. Petitioner is responsible for meeting all of their needs, including health care, during the summer months. During the school year, the children reside with their mother in the state of Maryland. (Testimony of Petitioner)
5. Petitioner's children came to Wisconsin on or about June 12, 2013 and returned to Maryland on or about August 20, 2013. The children remained with Petitioner, in Wisconsin, that entire time. (Testimony of Petitioner)

DISCUSSION

The federal regulation concerning FoodShare overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FoodShare due to an intentional program violation, an inadvertent household error (also known as a "client error"), or an agency error (also known as a "non-client error"). 7 C.F.R. § 273.18(b), emphasis added; see also *FoodShare Wisconsin Handbook (FSH)*, App. § 7.3.2.1. As such, it does not matter whose error caused the overpayment; it must be recouped.

In a Fair Hearing concerning the propriety of an overpayment determination, the agency has the burden of proof to establish that the action taken by the agency was proper given the facts of the case.

The Petitioner does not dispute the fact that he received FoodShare benefits for his two children during the time in question, nor does the Petitioner dispute the agency's calculation of the amount of FoodShare benefits he received for his children. However, Petitioner disputes the agency's contention that he was not entitled to those benefits.

It is the agency's contention that the two children were receiving FoodShare/Food Stamp benefits from the state of Maryland and as such the FoodShare benefits issued by Wisconsin were impermissible duplicate benefits per FoodShare Wisconsin Handbook (FSH) §3.4.1. The Petitioner testified that he had no knowledge of the children receiving FoodStamps in Maryland and the agency conceded that it would not have expected the Petitioner to be aware of this information.

In order to prove the children were receiving Food Stamp benefits in Maryland, the agency relied upon the hearsay statements of a Joyce Westbrook contained in a series of e-mails contained in Exhibits 4-7. There is nothing about this hearsay information that lends any indicia of reliability to Ms. Westbrook's statements. Indeed, there is no indication that they fall under any hearsay exception; there is no indication that they are regularly kept business records of the State of Maryland and Ms. Westbrook's basis of knowledge is unknown. As such, the information is potentially double or triple hearsay.

In addition, the Supreme Court of Wisconsin, in Gehin v. Wisconsin Group Insurance Board, 278 Wis. 2d 111, 692 N.W.2d 572, 2005 WI 16, held that a finding of fact cannot be based solely upon uncorroborated hearsay evidence, even if the hearsay falls under a recognized hearsay exception. Based upon the foregoing, it is found that the agency has not met its burden to prove, by a preponderance of the credible evidence, that the children were receiving Food Stamp benefits in the state of Maryland. As such, the agency has not met its burden to show that it correctly determined that Petitioner was overissued FoodShare benefits for the entire summer.

The Petitioner conceded that the children were not living with him in May 2013 or September 2013. As such, the agency correctly determined that the Petitioner was overpaid FoodShare benefits for those months. However, for June, July and August 2013, it is clear that the Petitioner was the primary caretaker of the children, because they lived with him 50% or more of those months and he the primary person responsible for their care and well-being. It should be noted that the agency did not dispute the fact that the children's physical placement was in Wisconsin during the summer of 2013.

The *FoodShare Wisconsin Handbook* states the following guidelines with respect to joint or shared physical custody of children:

3.2.1.1 Joint or Shared Physical Custody of Children

Children are included in the household where they reside when they are under the care and control of a [parent](#) or other caretaker in that household. There may be situations when the residence of a [child](#) is not easily determined. There are many methods that can be used to determine the child's residence. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. It may be a situation of joint custody and a 50-50 custody split. If one parent is not designated as primary caretaker, the parents can be asked to decide. Individuals can only be included in one food unit.

...

Only one parent can receive [FS](#) for a child. If you still cannot determine which food unit the child should be in, the caretaker that first applies would be eligible. Use the best information available to make your decision, and document in case comments the basis of your determination. If you still cannot determine which food unit the child should be in, call the [CARES](#) call center.

Because the Petitioner was the primary caretaker for the children in June, July and August 2013, he was entitled to receive FoodShare benefits for the children during those months.

CONCLUSIONS OF LAW

1. The agency correctly determined that Petitioner was over-issued FoodShare benefits for May 2013 and September 2013.
2. The agency did not correctly determine that Petitioner was over-issued FoodShare benefits for June, July and August 2013.

THEREFORE, it is

ORDERED

That the agency amend Claim Number [REDACTED] to reflect an overpayment for the months of May 2013 and September 2013, only. The agency shall take all administrative steps necessary to complete this task within 10 days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

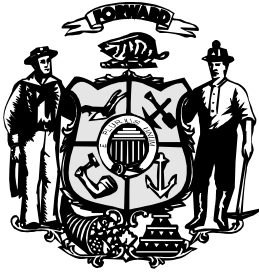
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 21st day of January, 2014.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 21, 2014.

Public Assistance Collection Unit
Public Assistance Collection Unit
Division of Health Care Access and Accountability